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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION

The final judgment of the district court was entered on July 20, 1953 (R. 25). The petition for appeal was filed and allowed on September 18, 1953 (R. 25-26). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948,

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62 Stat. 869. This Court noted probable jurisdiction of the appeal on November 30, 1953 (R. 28).

QUESTION PRESENTED

The complaint charges a conspiracy to limit those who may engage in the business of contracting to furnish and install lathing materials in buildings constructed in the Chicago area, and to eliminate competition in the making of such contracts. It is alleged that a major part of the materials which lathing contractors supply and install is shipped into the Chicago area from outside the state, with installation in Chicago-area buildings as the intended end of the interstate movement. The complaint further alleges that substantial quantities of these materials, which plastering contractors deliver to lathing contractors after purchase from local building material dealers, are shipped directly to the job site for delivery to lathing contractors, and that the dealers purchase substantial quantities pursuant to prior orders placed with them by plastering contractors. It is alleged that all such materials move in a continuous flow from their out-of-state origins to lathing contractors for installation in buildings in the Chicago area, and that the services performed by these contractors are essential to this interstate flow.

The question presented is whether, upon such allegations, the conspiracy charged against the defendants restrained commerce which is interstate, in violation of Section 1 of the Sherman Act.

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STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 1.]
>
> * * * * *
>
> Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 4.]

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against a trade association whose members are lathing contractors doing business in the Chicago area,[1] a local

[1] The Chicago area comprises most of Cook County and parts of two other Illinois counties (par. 7, R. 3).

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trade union with a membership of about 700 journeymen and apprentice lathers "who perform practically all of the lathing work in the Chicago area," and two individual members of the defendant trade association (R. 1-2). The defendant association, the Employing Lathers Association of Chicago and Vicinity, is referred to hereinafter as the Association; the defendant trade union, Local No. 74 of Wood, Wire and Metal Lathers Union of Chicago, Illinois, and Vicinity, will be referred to as Local 74.

The complaint charged the defendants, the present appellees, with conspiring to restrain interstate commerce in lathing materials shipped from outside the State of Illinois for installation in buildings constructed in the Chicago area.[2] The district court sustained defendants' motions to dismiss the complaint for failure to state a cause of action, and entered a judgment of dismissal (R. 25). In the opinion which it filed,[3] the court, with-

[2] While the complaint additionally charged, on the basis of the same allegations of fact, that the defendants had conspired to monopolize interstate commerce in lathing materials in violation of Section 2 of the Act, our argument will be confined to the validity of the primary charge of violation of Section 1. If this charge is sustained and later established by the proof, in the circumstances of this case the United States will be entitled to as broad relief as might be accorded if the charge of violation of Section 2 should also be sustained and established. We therefore deem the validity of the latter charge a matter which need not be pressed and which this Court need not reach. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314. If this Court upholds our contentions with respect to Section 1 of the Act, the Government will, after remand of the case to the district court, eliminate the charge of violation of Section 2.

[3] The opinion also covers the complaint in *United States* v. *Employing Plasterers Association of Chicago*, pending on ap-

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out quoting any allegation or even phrase found in the complaint, construed it as charging only "local restraint and monopoly," and declared that "the stream of interstate commerce" there described came to a halt before the alleged restraints became operative (R. 23). Upon this construction of the complaint, the court concluded that the acts charged against defendants were not banned by the Sherman Act. No decision under the Act was cited by the court. See R. 21-24.

The major facts alleged in the complaint, and admitted for present purposes by the motion to dismiss, are as follows:

In most of the buildings constructed in the Chicago area, the owner or general contractor makes a contract with a plastering contractor under which the latter agrees to furnish and install the plastering and lathing materials (par. 8, R. 3). The plastering contractor ordinarily subcontracts to a lathing contractor the job of installing the lathing materials,[4] and he furnishes these materials to the lathing contractor (*ibid.*). The lathing contractors function as independent entrepreneurs and employ journeymen and apprentice lathers to do the actual work of installation (par. 6, R. 3). There are about

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peal in No. 440, this Term, and two criminal proceedings which respectively parallel the two civil cases now pending on appeal before this Court. The judgments of dismissal in the criminal cases have been appealed to the Court of Appeals for the Seventh Circuit, but, by stipulation of the parties, these appeals are being held in abeyance pending determination of the two appeals to this Court.

[4] Lathing materials include gypsum lath, metal lath, corner-ites, corner beads, channel irons, and tie-wire (par. 11, R. 4).

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36 such contractors operating in the Chicago area (par. 9, R. 3). Sixteen are members of the Association (par. 3(a), R. 2); the dollar volume of the lathing contracts entered into in 1951 by these sixteen exceeded $5,000,000, constituting over 60% of the total lathing contracting business done in the Chicago area in that year (par. 10, R. 4).

The major part of the materials which the lathing contractors install is produced in states other than Illinois and is "shipped in interstate commerce" into the Chicago area "for sale and installation therein" (par. 11, R. 4). These goods are customarily shipped to local building material dealers, who purchase "for resale to plastering contractors" (par. 12, R. 4). Substantial quantities of these purchases are "in response and pursuant to prior orders" placed by plastering contractors (*ibid.*). Dealers also purchase substantial quantities from out-of-state sources in order to meet the "regular anticipated demands" of plastering contractors, and such materials "move in a continuous flow in interstate commerce * * * to the lathing contractors for installation" (par. 13, R. 4). In addition, plastering contractors purchase "through" local dealers substantial quantities of lathing materials which are shipped from outside the state "directly to the job site" or to the plastering contractor's place of business for delivery to the lathing contractor doing the work of installation (par. 14, R. 4). These materials "flow in a continuous, uninterrupted stream" from their out-of-state origins "to the job site for installation" (*ibid.*).

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Lathing contractors are "conduits" through which lathing materials shipped from other states "are applied to their intended use in the construction of buildings in the Chicago are," and the materials "flow in a continuous stream * * * to their final installation and use in buildings in the Chicago area" (par. 15, R. 4-5). The service of installation performed by lathing contractors "is an integral part of, and necessary to," this interstate movement. The lathing operation is also an integral part of the building construction industry and necessary to the completion of numerous further building operations, including installation of a wide variety of items. A substantial part of these items, used in buildings in the Chicago area,[5] is manufactured outside of Illinois and shipped in interstate commerce for use in such buildings, and these also "flow in a continuous uninterrupted stream from their points of origin * * * to the places of installation." (Pars. 16-17, R. 5.)

Any restraint upon or interference with the performance of lathing work in the Chicago area "necessarily and directly restrains and affects the interstate flow of lathing materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow" of the materials entering into the construction of buildings in that area (par. 18, R. 5).

The conspiracy in which appellees and their co-

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[5] In 1951 the building construction industry in the Chicago area engaged in new building or remodeling having a value of approximately $500,000,000 (par. 16, R. 5).

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conspirators[6] have been and are engaged is first alleged in the complaint in broad outline. It is charged that for many years they have combined and conspired to suppress competition among lathing contractors in the Chicago area and to restrict and exclude persons from engaging in this business, in "unreasonable restraint" of the interstate commerce in lathing materials described earlier in the complaint (par. 19, R. 6).

The substantial terms of this conspiracy, as further particularized, are that appellees and their co-conspirators agreed:

(a) to restrict and reduce the number of those who may engage in the lathing contracting business, by excluding therefrom any person who had not first secured the approval of Local No. 74 and any person who had not been a member of the Local for five years, and by restricting and reducing the membership of Local 74 by applying arbitrary racial and family-relationship standards for admission to membership;

(b) to assign particular plastering contractors to designated lathing contractors, thereby eliminating competition among lathing contractors for the business of plastering contractors and preventing the latter from choosing the lathing contractors with whom they wish to do business;

(c) to eliminate competition between lathing contractors and plastering contractors by freezing

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[6] "Numerous lathing contractors" in the Chicago area, including members of the Association, are named in the complaint as co-conspirators (par. 5, R. 2).

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and reducing the number of plastering contractors permitted to employ members of Local No. 74;

(d) to effectuate money payments by the Association to officers of Local No. 74 to induce them to use the power of the Local in furtherance of appellees' conspiracy (par. 20, R. 6-7).

These four aspects of the conspiracy are alleged in greater detail as follows (pars. 21-28, R. 7-9):

(a) Local 74 required those who wished to engage in the lathing contracting business in the Chicago area to apply to the Local for approval. Approval was granted only to those who had been journeymen members of the Local for five years. Those who failed to receive the Local's approval were not permitted to employ its members, and thereby were excluded from the lathing contracting business in the Chicago area. (Par. 22, R. 7.)

With past membership in Local 74 a prerequisite to engaging in this business, the Local has imposed arbitrary limitations on those who may become members. It has admitted to membership as apprentices only relatives of its journeymen members. It has refused to permit any Negro to become an apprentice or to be admitted to membership as a journeyman lather. It has refused to accept as members by way of transfer of membership, journeymen lathers of the Negro race who were members of out-of-state lathers' unions affiliated with the same International Lathers Union with which Local 74 is affiliated. (Par. 25, R. 8.)

(b) For many years each lathing contractor has registered with Local 74 the plastering contractor

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or contractors for whom he performed lathing subcontracts. The lathing contractors understood that, upon registration, a plastering contractor was "assigned" to the lathing contractor who had registered his name. Thereafter, no other lathing contractor would solicit the business of or perform lathing work for such "assigned" plastering contractor. The effect of this "assignment" plan was that no plastering contractor could obtain competitive bids from, or enter into subcontracts with, two or more lathing contractors. A plastering contractor who sought to change his lathing subcontractor had to secure the approval of Local 74, which frequently was denied. (Pars. 26-27, R. 8.)

Plastering contractors became dissatisfied with the "assignment" plan, which suppressed competition among lathing contractors and prevented plastering contractors from dealing with the lathing contractors of their choice. The plan became a disputed issue between the plastering contractors and Local 74, and as a result an agreement was entered into late in 1950 under which Local 74 recognized the right of plastering contractors to obtain bids from and make contracts with more than one lathing contractor. However, shortly thereafter appellees mutually agreed to continue the "registration" and "assignment" plan under the sponsorship of the Association. Each member agreed to register with the Association the plastering contractors whose accounts it "claimed," and agreed not to solicit or perform lathing contracts for a plastering contractor who had been registered by

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another lathing contractor as his "recognized" account unless the latter consented to such competition. (Pars. 27-28, R. 8-9.)

(c) Prior to the conspiracy, a number of plastering contractors in the Chicago area hired members of Local 74 to do lathing work. With the conspiracy's inception, no additional plastering contractor was permitted to hire journeymen lathers. The result has been that at the present time only seven out of approximately 140 union plastering contractors in the Chicago area may directly employ journeymen lathers. All other plastering contractors must subcontract their lathing work to lathing contractors. (Par. 23, R. 7.)

(d) To induce Local 74 to effectuate the conspiracy to restrict competition in the lathing contracting business, the Association has from time to time paid sums of money to officers of Local 74. The Association made 75% of its dues available for this purpose, and designated its promotion manager to pay sums of money and other consideration to officers and business agents of the Local. The Association also employs the president of Local 74 at a substantial salary to act as managing director of a foundation established and financed by Chicago-area lathing contractors for the purported purpose of promoting the lathing industry. (Par. 24, R. 7-8.)

The conspiracy is alleged to have had the following effects, among others: entry into the lathing contracting business in the Chicago area has been impaired and thwarted, and competition among

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those engaged in this business has been unlawfully restrained; interstate commerce in lathing materials has been illegally restrained; and the cost of building construction in the Chicago area has been artificially increased (par. 29, R. 9).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In holding that the allegations of the complaint do not show a restraint of interstate commerce.

2. In holding that, under the allegations of the complaint, the conspiracy which it sets forth operated only upon commerce which is intrastate.

3. In adjudging that the complaint fails to state a claim upon which relief can be granted.

4. In entering judgment dismissing the complaint.

SUMMARY OF ARGUMENT

The district court overlooked the fact, recognized in controlling decisions of this Court, that interstate commerce may be obstructed or restrained by conduct affecting the terminal outlets for goods moving interstate. Only recently this Court made it clear that interstate commerce may be affected, in fact and in law, by obstructions to local building activities which in turn obstruct the flow of goods moving interstate to be used in such activities. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675. The rationale of that decision is squarely applicable here.

A. The complaint unequivocally alleges that

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lathing materials, apart from their installation in buildings, have no utility for ultimate purchasers; that these materials are shipped into the Chicago area from points outside the state for installation in buildings therein; that the lathing contractors are the intended end of the interstate shipments; and that the materials move to such contractors without a break in the interstate journey. The materials remain "in" commerce until they reach the lathing contractors for whom they are intended.

B. The conclusion that the alleged conspiracy is within the Sherman Act would stand even if the interstate flow of lathing materials were deemed to end at some point short of the lathing contractors for whom the materials are intended. What matters is that the complaint plainly alleges that appellees' conspiracy directly and substantially burdens and restrains interstate commerce in lathing and other building materials. Where restraints of a kind condemned by the Sherman Act have such effects, the fact that the restraints are applied intrastate is no barrier to the Act's application. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464.

Nor does it matter that the precise details of the effects upon interstate commerce are not stated at length in the complaint. Allegations no less general than those involved here were held sufficient in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. Further particularization of the allegations is a matter for proof at trial, or for

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a motion for a more definite statement, as authorized by the Federal Rules of Civil Procedure.

C. Under the allegations of the complaint, appellees' conspiracy arbitrarily bars qualified persons from engaging in the business which provides the outlets necessary to bring interstate shipments of lathing materials to their intended end, delimits the number who may engage in such business, and eliminates competition among them. Such a combination curtails freedom to engage in interstate trade and subjects interstate commerce to the evils incident to destruction of competition, in contravention of the fundamental purposes of the Sherman Act. This Court has repeatedly held that combinations imposing like limitations on local outlets for interstate sales or shipments of goods violate the Sherman Act. It is well settled that the statute protects interstate commerce against unreasonable restraint at whatever point of such commerce the restraint applies. As this Court recently declared, protection of the earlier stages is of little worth without protection "at the outlets of the flow of interstate commerce." *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 152.

ARGUMENT

The Conspiracy Set Forth in the Complaint Is in Unreasonable Restraint of Interstate Commerce in Lathing Materials Shipped into the Chicago Area

In our view, the fundamental error in the district court's holding, for which no authority is cited, is the apparent assumption that obstructions to and

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restraints upon interstate commerce can occur only at the beginning, or in the course of, an interstate movement of goods. Thus, the court said (R. 24):

> If this were a situation where portable houses were being built, and there was an additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

But this analysis ignores the plain economic fact, recognized and emphasized in the decisions of this Court, that commerce among the states may be, and frequently is, burdened by practices at the terminal outlets for goods which move interstate. See, *e.g.*, *Local 167* v. *United States*, 291 U.S. 293, 297. Apart from the controlling precedents under the Sherman Act, which are discussed later, this central point is aptly illustrated in the building trades context involved here by recent decisions under the National Labor Relations Act. In *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, this Court considered whether unfair labor practices at a building project affected interstate commerce and were therefore within the jurisdiction of the Labor Board. The subcontractor immediately involved made out-of-state purchases totalling less than

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$56,000 annually. The subcontract for electrical work which occasioned the strike—the unfair labor practice found by the Labor Board—involved only $2,300. Sustaining the Board's finding that commerce was affected (341 U.S. at 683-684), the Court, in an observation which contrasts strikingly with the statement we have quoted from the opinion below, said (p. 684):

> The fact that the instant building, after its completion, might be used for only local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.

See, also, *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694; *Carpenters Union* v. *National Labor Relations Board*, 341 U. S. 707.

This reasoning is precisely applicable here. Here, as in the Labor Board cases (but on a much larger scale),[7] there is an interstate flow of goods which serve the single purpose of use in construction. And the uncontroverted allegations of the complaint state plainly that restraints upon those engaged in supplying and installing essential building materials have operated to restrain the commerce in these materials. The sufficiency of these allegations becomes clear, we think, once it is recognized—as this Court has recognized—that such construction, despite the intended local use of the

[7] The 1951 business of lathing contractors in the Chicago area exceeded $8,000,000; the 1951 business of the contractors who were members of the Association exceeded $5,000,000; and the major part of the materials which these contractors install is produced in states other than Illinois (pars. 9-11, R. 3-4).

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building constructed, can have a real and substantial effect upon commerce.

In the discussion which follows we show, first, that the interstate movement of lathing materials described in the complaint continues until the materials reach the lathing contractors for whom they are destined; second, that even if the materials in question were deemed to cease moving "in" commerce at some point short of delivery to the lathing contractors, the appellees' conduct would fall well within the scope of the Sherman Act's regulation as defined by decisions of this Court; and, third, that the acts with which appellees are charged are restraints on interstate commerce of a kind proscribed by the Sherman Act.

A. *The Lathing Materials Shipped from States other than Illinois Remain in Interstate Commerce until they reach the Lathing Contractors for whom they are Destined*

The complaint explicitly sets forth that a major part of the lathing materials installed in buildings in the Chicago area is produced outside the State of Illinois and is shipped into the area "for" installation in buildings constructed therein (par. 11, R. 4). These materials, until installed in buildings, are of no use to the ultimate purchaser, and the service of installation, which lathing contractors perform, is an "integral" and "necessary" part of the "movement in interstate commerce" of lathing materials shipped from outside the state to be "applied to their intended use in the construction of buildings in the Chicago area" (par. 15, R. 4-5). The mate-

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rials "flow in a continuous stream" from their out-of-state origins "to their final installation and use" in Chicago-area buildings (par. 15, R. 5). These are allegations of fact, stating definitely and unambiguously that lathing materials coming from beyond the state's borders move to the lathing contractors without a break in the interstate movement.[8]

Further allegations of the complaint pinpoint this fact. Thus, it is alleged that substantial quantities of materials are shipped from other states "directly to the job site" or to the plastering contractor's place of business "for delivery to the lathing contractor" who has undertaken the work of installation (par. 14, R. 4). Continuity of interstate movement is likewise clear as to the substantial quantities which local dealers purchase in other states "in response and pursuant to prior orders" placed with them by plastering contractors (par. 12, R. 4). Goods so purchased remain in interstate commerce "until they reach the customers for whom they are intended"; "the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse" of the wholesaler who purchased them from outside the state. *Walling* v. *Jackson-*

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[8] Cf. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 559 (C.A. 9), where the defendants were wholesalers who purchased certain products from outside the state and resold within the state to the ultimate users. The court, in sustaining the sufficiency of an indictment charging price fixing in defendants' sales, held that the allegation that the products in question moved from other states "in a continuous and uninterrupted flow to the ultimate users" was "a statement of an ultimate fact."

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ville Paper Co., 317 U. S. 564, 568-569. In that case the Court observed that the fact that the purchasing wholesaler "may treat the goods as stock in trade" or that title to the goods passes to him does not mean that the interstate journey ends at his warehouse; the contract, understanding, or special order pursuant to which he ordered the goods "indicates where it was intended that the interstate journey should terminate" (*id.* at 569).[9]

Still other substantial quantities of materials are purchased by local dealers from sources outside the state to meet "the regular anticipated demands" of plastering contractors (par. 13, R. 4). The complaint alleges that goods so purchased "move in a continuous flow in interstate commerce" from their out-of-state sources "through the dealers and plastering contractors to the lathing contractors for installation" (*ibid.*). The Court in the *Jacksonville Paper* case, *supra*, expressly recognized that there may be circumstances in which purchases "based on anticipation of needs of specific custo-

[9] It would have been clear, we think, long before the *Jacksonville Paper* case that the intermediate purchase by local building material dealers does not destroy the force of the allegations of continuity in interstate movement. The dealers purchase the lathing goods "for resale" to plastering contractors (par. 12, R. 4), and the lathing contractors to whom the plastering contractors deliver are the intended end of the shipments from other states (par. 15, R. 5). A product moving in interstate commerce continues therein "until [it] reaches the point where the parties originally intended that the movement should finally end." *Illinois Central R. R.* v. *Louisiana R. R. Commission*, 236 U.S. 157, 163, and cases cited. This rule, grounded in economic fact, applies generally, and serves to define the commerce which, because it is interstate, is within the Sherman Act. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309.

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mers" may establish that interstate commerce continues until the goods reach the customers whose needs were anticipated. 317 U. S. at p. 570. The "continuous flow" allegation requires the assumption that, under the circumstances in which the purchases now in question were made, the shipments did not lose their interstate character until they reached the customer-users whose needs were anticipated.

Pertinent, finally, is the decision in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 237-238, which held that Standard Oil's sales to Detroit customers of gasoline taken out of the company's marine terminal at River Rouge, Michigan, were sales "in" interstate commerce. Gasoline was brought to the terminal from other states in the company's Great Lakes tankers during the open season of navigation. During this season, sufficient supplies were accumulated to meet the winter's needs, and shipments to the terminals were not pursuant to orders already taken. It thus appears that even a product which comes to a long and indefinite period of rest within the state of resale does not necessarily lose its interstate character.

B. *Even if the Movement of the Lathing Materials "in" Interstate Commerce Ended before They Reached the Lathing Contractors, the Conspiracy Unreasonably Restrains Interstate Commerce*

We have argued above, and we think the complaint fairly alleges, that the lathing materials

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move "in" interstate commerce until they reach the lathing contractors for installation. It remains to point out that the appellees would be no better off if this were not so. The complaint alleges that restraint upon or interference with performance of lathing work in the Chicago area "necessarily and directly restrains and affects the interstate flow of lathing materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow of" building materials entering into the construction of buildings in the Chicago area (par. 18, R. 5). The complaint further alleges that the conspiracy has caused interstate commerce in lathing and related building materials to be "unlawfully restrained," and that it has caused an artificial increase in the cost of building construction in the Chicago area (pars. 29(c), (e), R. 9). The important fact appearing from these allegations, regardless of any supposed point where interstate commerce ends and intrastate commerce begins, is that the materials move into the state solely and precisely for use by the lathing contractors. Because this is so, the restraints on such use—and the concomitant restraints on the flow of the materials into the state—fall within the prohibitions of the Sherman Act.

There is, of course, no doubt that the Sherman Act is violated when restraints of a kind condemned by the Act affect and operate upon interstate commerce, although application of the restraints is intrastate. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464. In such a situation, it is

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not necessary to decide the precise point at which "interstate commerce ends and that which is intrastate begins." *Local 167* v. *United States*, 291 U. S. 293, 297. Interference with freedom of trade "at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce" (*ibid*). As this Court put the matter in another Sherman Act case, it is not necessary "to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective." *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232.

Nor is the charge of effect on interstate commerce defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect. This is a matter appropriate for development at the trial, and the defendants, in advance of trial, may move under Rule 12(e) of the Federal Rules of Civil Procedure for a more definite statement of this aspect of the complaint. The allegations here are at least as specific as those held to be adequate in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219.[10]

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[10] In that case the basis of the Sherman Act proceeding against a sugar refiner was price fixing in the purchase of sugar beets by the three refiners located in the area in which the plaintiff grew sugar beets, the principal raw product used in making refined sugar. The purchases were intrastate, but the following allegations were held to set forth an effect on interstate commerce sufficient to state a cause of action under the Sherman Act: "interstate commerce in sugar was illegally

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In appraising the allegations of effect, it is relevant to consider that the effect is not that of a single act, or of a series of isolated acts, but of day-to-day and continuing control over outlets requisite if the interstate flow into the Chicago area of lathing and other building materials is not to be dammed. Furthermore, the conspiracy embodies a pattern of restraint "which if left unchecked may well become far-reaching in its harm to commerce." Cf., *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 647-648; *Mandeville Farms* case, *supra,* at p. 236. That the restraints involved here are of a pattern with restraints which have repeatedly plagued the building construction industry is not a matter of speculation. Such restraints have been the subject of many proceedings under the Sherman Act. Typical cases involving building materials or equipment are [11]

Electrical equipment: *United States* v. *Northeast Texas Chapter, National Electrical Contractors Assn.,* 181 F. 2d 30 (C. A. 5); *United States* v. *Minneapolis Electrical Contractors Assn.,* 99 F. Supp. 75 (D. Minn);

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restrained" and "competition therein" was "destroyed"; as a direct and planned result of the conspiracy, "the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners producing and selling raw sugar in interstate commerce in competition with each other, "they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system * * *." 334 U.S. 226.

[11] The cases cited do not include the numerous Sherman Act cases involving building materials where a bid depository was used as a means for fixing prices.

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United States v. *Chattanooga Chapter, National Electrical Contractors Assn.*, CCH Trade Reg. Reporter, ¶67,551 (E. D. Tenn.).

Plumbing supplies: *United States* v. *Central Supply Assn.*, 6 F. R. D. 526 (N. D. Ohio); *United States* v. *Las Vegas Merchant Plumbers Assn.* (D. Nev.), *Federal Antitrust Laws*, CCH 1952, p. 409 (appeal from convictions pending, C. A. 9).

Plaster and plastering materials: *United States* v. *Employing Plasterers Assn.*, appeal pending No. 440, this Term; *United States* v. *Contracting Plasterers' Assn. of Long Beach* (S. D. Calif.), *Federal Antitrust Laws*, CCH 1952, p. 206.

Glass: *United States* v. *Glass Contractors' Assn.* (N. D. Ill.), *Federal Antitrust Laws*, CCH 1952, p. 219.

Marble: *United States* v. *Associated Marble Companies* (N. D. Calif.), *Federal Antitrust Laws*, CCH 1952, p. 224.

Tiles: *United States* v. *Tile Contractors' Assn. of America* (N. D. Ill.), *Federal Antitrust Laws*, CCH 1952, p. 222.

Lumber: *United States* v. *Harbor District Lumber Dealers Assn.* (S. D. Calif.), *Federal Antitrust Laws*, CCH 1952, pp. 213, 246. Cf. *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395.

Built-up roofs: *United States* v. *Detroit Sheet Metal & Roofing Constructors Assn.*, 116 F. Supp. 81 (E. D. Mich.).

We submit, in short, that both economic fact and controlling precedent must be ignored to conclude that, because they are "local", restraints in the

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building trades *cannot* affect the interstate flow of materials which move for the single purpose of use in these trades. And only such a fallacious conclusion could explain the decision below. For the complaint states clearly and unambiguously that appellees' restraints operate upon the interstate flow of lathing materials into the Chicago area. Such allegations define conduct squarely within the area regulated by the Sherman Act.

C. *Appellees' Restrictions on Outlets for Interstate Shipments of Lathing Materials are Restraints on Interstate Trade, of a Kind Banned by the Sherman Act*

Appellees' conspiracy reduced and restricted the outlets for lathing materials shipped into the Chicago area in interstate commerce. The conspiracy limited these outlets to (a) the plastering contractors who were engaged in installing lathing materials prior to the beginning of the conspiracy and (b) those persons who could obtain the approval of Local 74 to operate as lathing contractors, an approval denied to any person not previously a journeyman member of the local for five years (pars. 22-23, R. 7). Appellees, by these limitations, barred 95% of all plastering contractors doing business in the Chicago area (par. 23), and they reduced the number of lathing contractors in the area, compared with 1925, by more than 60% (par. 29(a), R. 9).[12]

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[12] From a long-range standpoint, Local 74's membership restrictions limited the number of lathing contractors. Only a past member of the Local could become a lathing contractor.

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The conspiracy, in addition to reducing and restricting those who might engage in the business of providing necessary outlets for interstate shipments of lathing materials, eliminated all competition among those who were permitted to engage in this business. An "assignment" plan was established under which each plastering contractor could deal with only the one lathing contractor who had registered his name with Local 74. Furthermore, no plastering contractor could shift from the lathing contractor to whom he was assigned without procuring the approval of Local 74. Later, when Local 74 agreed to permit plastering contractors to obtain bids from and make contracts with more than one lathing contractor, the Association members agreed to continue the assignment plan under the sponsorship of the Association. (Pars. 26-28, R. 8-9.)

To assure the cooperation of officers and business agents of Local 74, a venal relationship between them and the Association was established, by providing substantial Association funds for payment to these officers and agents (par. 24, R. 7-8).

In short, appellees maintained and enforced a tight oligarchy of a business providing the sole outlet for entry into the Chicago-area market of lathing materials shipped from other states. Competition among members of this oligarchy was also eliminated. Beyond any question, these restraints are far more drastic than what was condemned as illegal in *United States* v. *Women's Sportswear*

The Local permitted only relatives of existing members to become apprentice members, and excluded all Negroes as journeymen members (par. 25, R. 8).

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Assn., 336 U.S. 460. There the defendants merely required jobbers of women's sportswear to have stitching work (necessary to complete garments ordered by the jobbers' customers) done by members of the stitching contractors' association who were in good standing with the International Ladies' Garment Workers' Union.

We submit that the restraints charged in the instant case are just as clearly within the prohibitions of the Sherman Act as the restraints imposed by a conspiracy to require a commodity brought into a city from other states to be delivered only to certain terminals, to limit the number of such terminals, and to require each importer of the commodities to deal with only one designated terminal. Cf. *Local 167* v. *United States,* 291 U.S. 293.

The principles which control where, as here, the conspiracy narrows and controls the trade outlets for incoming materials, and compels those who require such outlets to deal on a non-competitive basis with a single outlet, are clearly stated in *Lorain Journal Co.* v. *United States,* 342 U.S. 143. The Court there said (p. 152):

> Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.

This Court has from an early date, and with great consistency, condemned as illegal under the Sherman Act combinations, enforced by boycotts

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or other means, to cut off or otherwise restrain local trade outlets for goods sold or shipped interstate. Among such decisions are *Montague & Co.* v. *Lowry*, 193 U.S. 38 (tiles); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 48-49 (enameled iron wear); *Eastern States Retail Lumber Dealers' Assn.* v. *United States* 234 U.S. 600, 611 (lumber); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465 (women's clothes); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (motion pictures); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (taxicabs); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (news and advertising). See also *Associated Press, Inc.* v. *United States*, 326 U.S. 1, 18-19.

In the instant case the district court appears to have believed that the absence of an allegation that the conspiracy affected the "interstate market price" of lathing materials invalidated the complaint (R. 16). But the Sherman Act prohibits not only conspiracies to fix or manipulate market prices but also conspiracies to engage in restrictive practices, including apportionment of customers, which "otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-498.

The court below apparently also attached significance to the absence of an allegation that the defendants "intended to burden interstate commerce" (R. 17). However, it is well settled, at least since the early case of *United States* v. *Patten*, 226

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U.S. 525, 543, that "no allegation of a specific intent to restrain" interstate commerce is necessary.[13] This Court ruled that those charged with conspiracy "must be held to have intended the necessary and direct consequences of their acts" and that when they engage in a conspiracy which necessarily produces a result which the statute is designed to prevent, "they are, in legal contemplation, chargeable with intending that result" (*ibid.*).

In the court below appellees relied in major measure upon *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64, and *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103. In the former case building contractors in San Francisco and dealers in building materials supplying such contractors formed an organization composed of such contractors and dealers for the purpose of maintaining the "open shop" policy in employment of labor used in constructing buildings in San Francisco. In order to enforce this policy, the defendants adopted a "permit system," applicable to certain specified materials which were produced in California. Only contractors who maintained an open shop were given a permit, and the dealers furnished permit materials only to contractors holding permits. This Court held that, on these facts, there was no restraint of interstate commerce banned by the Sherman Act. The principal contrary contention was that, since non-permit contractors

[13] In the *Patten* case the issue was whether the allegations of the indictment stated an offense under the Sherman Act.

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were unable to obtain materials necessary for carrying out construction jobs, they were eliminated as potential purchasers of building supplies, not covered by the permit system, manufactured in other states. This Court held, however, that this effect upon interstate trade "was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." 268 U. S. at p. 82.

The *Morrin* case involved the reverse situation—suit to enjoin certain labor unions from combining to force those engaged in erecting structural steel in buildings constructed in New York City, to operate upon a closed union shop basis. The issue reviewed by this Court was whether the complaint stated a cause of action under the Sherman Act. The Court said that, under the allegations, "the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor." 289 U. S. at 107. It held: "If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts * * *." *Ibid.*

In *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, which gave effect to the established rule that acts done within a state may illegally restrain interstate commerce, the Court referred to the *Industrial Association* and *Morrin* decisions as follows (p. 297):[14]

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[14] The explanation quoted is repeated in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234, n. 14.

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> It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.

In the present case, in contrast with the cases on which appellees rely, the restraints did "directly touch upon interstate commerce." They closed outlets which are "an integral part of * * * the movement in interstate commerce" (par. 15, R. 5). They also eliminated competition in procuring the services of those necessary to complete the interstate movement, in contravention of the fundamental purpose of the Sherman Act "to protect the public against evils commonly incident to destruction of competition" (*Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 512). Given these factual differences, it seems unnecessary to press at length the further point that the Court in the cases which appellees invoke approached the interstate commerce question from the standpoint of "direct" or "indirect" effect thereon, an approach now deemed not illuminating. See *Wickard* v. *Filburn*, 317 U. S. 111, 122-125; *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229-231.

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CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
MARVIN E. FRANKEL,
Special Assistants to the Attorney General.

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